COMMENTS

CONSTITUTIONAL LAW—CLEAR AND PRESENT DANGER TEST—CONTEMPT BY RADIO.—In *Baltimore Radio Show, Inc.* et al. *v. Maryland*[1] appellants were adjudged not guilty of contempt of court for broadcasting over local radio stations, with state wide coverage, certain news dispatches obtained from a police commissioner concerning a murder charge against Eugene H. James, a Negro, who was then in custody of the police pending trial.

James had been charged with the murder of an eleven year old girl at a time when the public was aroused due to a series of assaults in Baltimore and Washington, D. C. At his trial a jury was waived because counsel felt that

> . . . inasmuch as it was common knowledge throughout the city that James had, allegedly, made a confession, and that he had been previously convicted for crimes somewhat similar to his then present indictment . . . [counsel felt that he] could not have picked a jury that had not been infected, so to speak, by the knowledge of this man's confession and his criminal background.[2]

James pleaded not guilty and not guilty by reason of insanity, but the trial court found him guilty. The decision was affirmed on appeal.[3]

While James was awaiting trial, the appellant radio station made a number of broadcasts in which it identified James by name, age, color, and address, which address, as was carefully pointed out, was near the scene of the crime. The broadcasts stated that James had confessed to this crime and also to a previous assault on a white woman, and that he had previously served time for attacking a ten-year-old girl. A typical excerpt from one of the broadcasts is

> . . . this morning, according to the officers, James admitted an attack on a white woman recently in the same woods near where the Brill girl was slain. In that case, too, James used a knife but only to threaten his victim into submission. . . With more information supplied by James, police recovered the woman's pocketbook, which had been taken from her . . . . James is not an obivous mental case. Throughout all

1. 67 A.2d 497 (Md. 1949), *cert. denied*, 338 U.S. 912 (1950).
2. *Id.* at 504.
3. James v. State, 65 A.2d 888 (Md. 1949).

> this questioning, said the police, he seemed, as they put it, "quite cute," in other words, wary. When James freely admitted the assault on the woman the police were encouraged and renewed their interrogation with renewed vigor. They felt that James had admitted the lesser assault only to throw the police off the main track, and they felt they were close to a confession in the Brill Case. They were in fact.[4]

This and similar broadcasts constituted the basis of the contempt charge in that these broadcasts tended to influence any jury that might have been chosen upon James' trial thus interfering with a fair administration of justice.

The Maryland Court of Appeals found that the radio station's conduct did not constitute a clear and present danger to the orderly and fair administration of justice, basing the decision on the ground that the court "cannot assume as a matter of law . . . that either judges or jurors will be influenced by considerations which under their official oaths they are bound to disregard."[5]

The court went on to say that the same test for constructive contempt—clear and present danger—is to be applied in cases in which jurors are involved, such as the present one, as is applied in cases dealing with judges. Judges are not so "angelic" as to render them immune from influences calculated to affect others; and, conversely, juries are often composed of citizens who are capable of the same firmness and impartiality as the judiciary.

In brief, the court held that despite great public fervor and indignation as a result of several so-called sex crimes in and near the city of Baltimore, the publishing of inflammatory words does not present a clear and present danger to the orderly and fair administration of a trial involving a Negro charged with the murder of a white child in a Southern state.

Contempts of court are of two kinds: those committed in the very presence of the court which tend to embarrass or prevent justice, termed direct, and constructive contempts; those committed out of the view of the court which tend to belittle, degrade, obstruct or prevent justice.[6] For many years it has been said that courts possess the inherent power to punish for con-

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4. Baltimore Radio Show, Inc. *et al.* v. Maryland, 67 A.2d 497, 501 (Md. 1949).

5. *Id.* at 510.

6. BOUVIER, LAW DICTIONARY 651 (3d Revision) 1914.

tempt those persons who are not connected with the trial, but who disturb its proceedings.[7]

Nelles and King, in their article, "Contempt by Publication in the United States," list the following formula as being the basis of the decisions in the State cases sustaining punishment for publications:

> The inherent power of the court, arising from its necessity of maintaining itself as an efficient agency for the administration of justice, and sanctioned by immemorial usage, extends to the infliction of summary punishment
>
> (1) for a publication respecting a court, or a judge in his judicial capacity, calculated to bring its or his administration of justice into disrepute (scandalizing the court);
>
> or (2) for a publication which may obstruct the administration of justice "in a pending cause."[8]

At the present time there seems to be some doubt as to whether the courts do have this inherent power to punish for contempt. This is pointed out in *Bridges v. California*,[9] the leading case dealing with constructive contempt which is embraced in the principal case. The *Bridges* case arose over a series of articles published by the *Los Angeles Times* which recommended certain punishment for a group of labor hoodlums who had been found guilty of assault with a deadly weapon and were awaiting sentence. The editorials threatened the judge with future adverse criticism from the *Times* should the judge fail to give the sentence that it thought proper. The paper was found to be in contempt of court by the state supreme court which decision was reversed by the United States Supreme Court.

The issue in the *Bridges* case was whether the publications involved created "such likelihood of bringing about the substantive evil [disorderly and unfair administration of justice] as to deprive [the paper] of the constitutional protection [freedom of the press]?" This, of course, raises the further question of delimiting the term "likelihood."

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7. Deutsch, *Liberty of Expression and Contempt of Court*, 27 MINN. L. REV. 296 (1943).

8. 28 COL. R. REV. 525, 537 (1928).

9. 314 U.S. 252 (1941). The scope of this comment does not include the history of contempt, but merely deals with the decisions involving contempt of court since the *Bridges* case. For history concerning the power of courts to punish for contempt in summary fashion see FOX, CONTEMPT OF COURT c.II; Deutsch, *Liberty of Expression and Contempt of Court*, 27 MINN. L. REV. 296 (1943).

The decision in the *Bridges* case is based on language used by Mr. Justice Holmes in *Schenck v. United States*[10] wherein he stated:

> .... in many places and in ordinary times the defendants in saying all that was said . . . would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. . . The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. . . . It is a question of proximity and degree.[11]

The court, in the *Bridges* case, goes on to say that,

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.[12]

It is then pointed out that the topic involved is one of public interest and one that should receive the benefit of full and complete discussion if it is to be settled satisfactorily. As the utterances were made during the pendency of the case, holding the appellant guilty of contempt would be restricting its utterances at the precise time when they are most needed. It would remove controversies that command the most interest from the "arena of public discussion" so that, if the curtailment of expression can be "justified at all, it must be in terms of some serious substantive evil which they are designed to avert"—disorderly and unfair administration of justice.[13]

The court concluded that the editorials were not such as amount to a "substantial influence upon the course of justice," as a contrary holding "would be to impute to judges a lack of firmness, wisdom, or honor, which we [the court] cannot accept as a major premise."

The case was decided by a 5-4 vote, a strong dissent by Mr.

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10. 249 U.S. 47 (1919).
11. *Id.* at 52. Defendant sent circulars through the mail saying that the draft violated the Thirteenth Amendment of the Constitution and, although not expressly urging draftees to resist the draft, its implied meaning, as found by the Court, was to urge persons subject to the draft to obstruct the carrying out of same.
12. 314 U. S. 222, 263 (1941).
13. *Ibid.* The Court expressly says that a newspaper may not be summarily punished for showing disrespect for the bench, for Americans have always been able to criticize public institutions.

Justice Frankfurter pointing out that, although the majority does not say in so many words that trial by newspaper has constitutional sanctity, "the atmosphere of their opinions and several of its phrases" infer that it does. The clear and present danger rule is one of "proximity and degree" and can only be applied correctly by the exercise of good judgment.

The majority in the *Bridges* case is thus saying that the "inherent" or "reasonable tendency test," as used in *Toledo News Co. v. U. S.*[14] and by the California Supreme Court,[15] of a publication to cause disrespect for the judiciary or interference with the orderly administration of justice in a pending case, is not sufficient to establish punishable contempt, but that the publication must amount to something more — a clear and present danger to the orderly and fair administration of justice.

A case illustrating the difference between the "reasonable tendency" rule and the stricter "clear and present danger" rule is *Graham v. Jones*,[16] which involved comments by a newspaper proposing a decision for a case, then before the Supreme Court of Louisiana, dealing with a reorganization program passed by the state legislature. The court found that the editorials were designed to influence the court's decision by means of a cultivated public clamor. In fact the newspaper was unable so to influence the court; but while a motion for a rehearing was pending, the newspaper published numerous articles describing how the Legislature and the Governor were ready to take every step possible to repair the damage done by the invalidation of the Reorganization program by the supreme court. The articles named the judges responsible for the decision and intimated that they were responsible for the fall of an amendment designed to do away with corrupt government, thus inferring to the public that the Supreme Court of Louisiana could have reached a contrary decision had it so desired.

The court points out that the language used by the newspaper goes far beyond a fair and reasonable criticism of the decision in the Reorganization case. It goes on to say that constructive criticism is helpful in the due administration of the law, but a publication ridiculing the court's decision and creating an atmos-

14. 247 U.S. 402 (1918).
15. Bridges v. Superior Court, 14 Cal. 2d 464, 94 P.2d (1940).
16. 200 La. 137, 7 So.2d 688 (1942).

phere of disapproval in the public's mind is not such criticism as will aid the court to rectify error. In view of the fact that there was extensive publicity given the pending suit, involving the validity of a constitutional amendment providing for a drastic change in the form of government and that the paper enjoyed a large circulation throughout the state, "it can not be disputed that the editorials tended materially to affect the orderly administration of justice in the proceeding to which they refer . . . ." Such being the effect of the editorials, publishing them amounts to contempt of court under the "reasonable tendency" rule, but due to the *Bridges* case repudiating this rule and overruling, in effect, the "jurisprudence refusing to extend the constitutional protection of liberty of the press and freedom of speech to the offenders as their contemptuous acts deserved" the newspaper was found not to be in contempt of court.

The principal case cites a 1946 United States Supreme Court decision, *Pennekamp v. Florida*,[17] as supporting its argument that the published utterances of the appellant radio station do not amount to a clear and present danger to the fair and orderly administration of justice. The *Pennekamp* case adds little to the standard set by the *Bridges* case. The *Pennekamp* case concerns editorials and a cartoon which

> . . . caricatured a court by a robed compliant figure as a judge on the bench tossing aside formal charges to hand a document, marked "Defendant dismissed," to a powerful figure close at his left arm and of an intentionally drawn criminal type. At the right of the bench, a futile individual labeled "Public Interest" vainly protests.[18]

The editorials and cartoon were in reference to the handling of several rape cases by the court. As found by the court, the editorials contained only "half truths" and did not "fairly report the proceedings."

The case is merely a restatement of what the court had previously said in the *Bridges* case. The facts in this case are such that even Mr. Justice Frankfurter, an advocate of the reasonable tendency test, found that they did not "tend to influence or attempt to influence the court."[19] Also to be noted in this case is the fact that there is a difference of opinion among the majority

17. 328 U.S. 331 (1945).
18. *Id.* at 337.
19. *Id.* at 367.

as to whether or not the "rape" cases were pending when the editorials were published because if they were not pending there is no punishable contempt by the very definition of the word.

As the principal case assumes that the standard to be applied to juries, in determinnig whether there is a clear and present danger to the orderly and fair administration of justice, is the same as applied to judges, it relies on the United States Supreme Court's most recent decision, *Craig v. Harney,* [20] wherein a newspaper was found guilty of constructive contempt by the state court when it (newspaper) commented on a forcible detainer case, *Jackson v. Mayes,*[21] in which Jackson sought to regain possession of a business building which Mayes (who was in the armed forces at the time and was represented by an agent) claimed under a lease, to further show the application of this standard. The articles called the ruling in the *Jackson* case an "arbitrary action and a travesty on justice." They criticized the fact that the judge was a layman. The articles stated that the opinion was a "gross miscarriage of justice" and that the judge's behavior had properly brought the "wrath of public opinion upon his head," that the defendant was getting a raw deal and that justice had not been done in that both sides did not get a fair opportunity to be heard. These comments appeared in the various papers while a decision was pending upon a motion for a new trial.

The United States Supreme Court, holding that the editorials did not amount to a contempt, thus reversing the state court, repeats the doctrine found in all of its decisions under the clear and present danger rule.

> A judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. . . . The vehemence of the language used is not alone the measure of the power to punish him for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.[22]

Mr. Justice Frankfurter, dissenting, says that "today's decision, in effect though not in terms, holds unconstitutional a

20. 331 U.S. 367 (1947).
21. Unreported Texas decision.
22. *Id.* at 376.

power the possession of which by the States this Court has heretofore deemed axiomatic."[23] If the Court intends to put an end to the power of States to allow summary proceedings for constructive contempt, and to allow the power only in those cases which actually interfere with the trial, then the court should say so instead of agreeing with a "principle in principle only to depart from it in practice."

In the preceding cases there are several points which are common to all. The *Bridges* case states flatly that a newspaper may not be summarily punished for scandalizing a court as there is no substantive evil involved which will warrant curtailment of freedom of the press. But the court states that such punishment is proper if there is a clear and present danger to the orderly and fair administration of justice, it being a substantive evil which will warrant the court in curtailing the freedom of press. This principle has been followed in the other cases by the United States Supreme Court.

In all of these cases, the comments by the various newspapers touched upon subjects that were of vital public interest. The *Bridges* case involved a labor controversy which was of general interest, particularly in that it dealt with a threatened general strike on the West coast. This was a subject which demanded for its satisfactory solution intelligent comments and free discussion. It affected the every day lives of the people. The *Pennekamp* and *Craig* cases pertained to the handling of cases by the state courts. In the *Pennekamp* case the comments went to the administration of criminal justice, while the comments in the *Craig* case, although arousing public sympathy toward the serviceman who was involved, also criticized the court system which allowed a layman to sit as judge and which had no provision for appeal. Though the criticisms of the courts were published while the two cases were pending, the comments were of a general nature, going to the court system as a whole and not interfering with the orderly and fair administration of justice. The articles concerned subjects of public interest; and an independent judiciary necessitates freedom of the press. The *Graham* case also involved a subject of public interest—legislative anactments. Although the newspaper did not present the subject in the best taste, the articles

23. *Id.* at 384.

were necessary in order to arouse public interest so that a constitutional amendment might be passed putting into effect the reforms sought by the Reorganization program which was declared to be unconstitutional.

Thus it is seen that these editorials were of public interest, affecting the community as a whole. They dealt with subjects which depend, for their final and agreeable settlement, upon the active interest of the public therein. They involved topics which newspapers are under an obligation to present to the public.

The principal case, which involved attacks on children, was of interest to the public; but this interest should be limited to the apprehension of the offender and to future protection of the children from attacks of this sort. The area of public discussion does not, and should not, include the comments which were made by the broadcasting company which recited James' alleged prior offenses and previous convictions. These were not broadcasted in the interest of good news-broadcasting, but merely in an attempt to hold the listener to the station. This was used as a device to obtain listeners at the cost of James' right to a fair trial with an impartial jury.

Does the United States Supreme Court mean to apply the same standard to juries as it applies to judges? As pointed out in the dissent to the principal case, the majority seems to reject the United States Supreme Court doctrine, and adopt the minority view, as to the relation of judges to publications in that the majority says that "judges are not so 'angelic' as to render them immune to human influences calculated to affect the rest of mankind." While this is probably the more realistic view, it is not in harmony with the United States Supreme Court decisions which are based upon the premise that judges are gifted with such firmness, wisdom, and honor that they are able to withstand the most relentless and contemptuous of attacks.

As a result of using the minority view, the court in the principal case arrives at the conclusion that the United States Supreme Court did not mean to differentiate between the standard applied to judges and the standard to be applied to juries. This conclusion is purely conjectural because there are no decided cases, since the *Bridges* case, which deal with juries. It would seem, in view of the language used in the decisions by the United States Supreme Court, that this reasoning by the majority in the prin-

cipal case is fallacious in that, as pointed out previously, the Court imputes a greater amount of firmness to a judge than can be expected to be found in the average juror.

The majority in the principal case suggests that a juror who is prejudiced so as not to be fit for jury duty may be discovered during his voir dire, but assuming that the juror answers truthfully that he is not prejudiced, can it be said that he is entirely unaffected by what he has heard and read prior to his selection as a juror?

It is suggested that the simplest and surest method of obtaining a lack of bias or prejudice on the part of a juror is by limiting the opinions of others that are expressed through the medium of radio and newspaper.

On January 9, 1950, the United States Supreme Court denied certiorari to petitioner seeking review of *Baltimore Radio Show, Inc.* et al. *v. Maryland.*[24] Mr. Justice Frankfurter wrote an opinion dealing with the denial of the petition for writ of certiorari in which he points out that this denial means simply that fewer than four members of the court "deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion.' " It in no way means that "either the majority or the dissent in the court below correctly interpreted the scope of our decisions in *Bridges v. California, Pennekamp v. Florida,* and *Craig v. Harney.*" At the end of his opinion, Mr. Justice Frankfurter, sets forth recent English decisions "dealing with situations in which publications were claimed to have injuriously affected the prosecutions for crime awaiting jury determination" and then points out that this has not yet been adjudicated by the United States Supreme Court.

The English courts use the "reasonable tendency" test, but there is no reason why the same result could not be obtained in the United States under the "clear and present danger" test as both tests are merely phrases used to describe a situation that will affect the orderly and fair administration of justice. There is no definition for "clear and present danger"—it is a question of proximity and degree.

Somewhat of a standard has been set by court adjudications but they apply to judges only. Using the United States Supreme Court's premise that judges are a hardy lot and should be able

24. 338 U.S. 912 (1950).

to survive in a hard climate, does it necessarily follow that the same standard should apply to jurors? It would seem that there would be a clear and present danger to the substantive evil of a disorderly and unfair administration of justice in that jurors may be biased by what they have heard and read outside of the court room long before a judge would be, unless the same premise is to be applied to jurors.

WALTER J. TAYLOR, JR.

CONSTITUTIONAL LAW— RIGHT TO JURY TRIAL UNDER EMERGENCY PRICE CONTROL ACT. In *United States v. Jepson*[1] the government brought an action under the Emergency Price Control Act of 1942[2] to recover treble damages for rent overcharges. The defendant moved for a jury trial, claiming that his right fell within the guarantee of the Seventh Amendment of the United States Constitution. *Held,* this action for a penalty under statute conforms to the requisites of the common law action of debt and trial by jury should be upheld.

In speaking of penalties under a civil statute, Blackstone was of the opinion that the action of debt arose from the obligations imposed on each citizen by the original social contract. When that contract was broken, the legislature prescribed a sum certain as a penalty which then became due and owing as a debt.[3] In the instant case it is the statute that supplies the *causa debendi* and stipulates that a certain or ascertainable sum is due and owing to specified persons when the specified acts are done.[4] Thus, all the requisites of the action of debt are fulfilled when the obligation to pay and the certainey of the amount due arise from the operation of the statute.

The right to trial by jury in a civil case originates in the Seventh Amendment of the Constitution which states:

> In suits at common law where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.[5]

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1. 90 F. Supp. 983 (D.C.N.J. 1950). The opinion is that of the district court judge in response to defendant's motion for a jury trial.
2. Presumably under § 205e of 56 STAT. 23, 50 U.S.C. § 205e (1946) as amended 50 U.S.C.A. § 925e (Supp. 1950).
3. 3 BL. COMM. 161.
4. KEIGWIN, CASES IN COMMON LAW PLEADING, 34 (2d ed. 1934).
5. U.S. CONST. AMEND. VII.